

**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-023

XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX LT

FINAL DECISION

AUTHOR: Ulmer, D.

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was docketed on November 18, 2005, upon receipt of the applicant's completed application and military records.

This final decision, dated August 9, 2006, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a member of the Coast Guard Reserve, asked the Board to correct his record to show November 22, 2000 as his Reserve lieutenant (LT) date of rank instead of November 22, 2002. He alleged that his date of rank is incorrectly listed on his Oath of Office and in the Coast Guard Reserve Register of Officers. The applicant stated that because of the alleged error, his record was not placed before the calendar year 2005 inactive duty promotion list (IDPL) lieutenant commander (LCDR) selection board.

The applicant was an officer in the regular Coast Guard and was promoted to the rank of LT on November 22, 2000. On August 23, 2003, he resigned his regular commission and sought a commission in the Reserve. On November 18, 2003, upon the approval of the Commander, Coast Guard Personnel Command (CGPC), the Secretary of Homeland Security appointed the applicant a LT in the Coast Guard Reserve, with a November 22, 2002 date of rank. The applicant accepted his appointment in the

Reserve by executing his oath of office on January 10, 2004, which listed November 22, 2002, as his date of rank.

The applicant stated that his Reserve LT date of rank should be November 22, 2000, which is the date he was promoted to that grade on active duty. He presented several documents that show that he served in the grade of LT prior to his resignation from the regular Coast Guard. He stated that the matter of his incorrect date of rank was brought to light by the absence of his name from the list of candidates that were to be considered by the calendar year 2005 IDPL LCDR selection board.

VIEWS OF THE COAST GUARD

On April 11, 2006, the Judge Advocate General (JAG) submitted an advisory opinion recommending that the Board grant alternative relief.

The JAG admitted that the Coast Guard committed an error by assigning the applicant a November 22, 2002 date of rank. In this regard, the JAG noted that the applicant had served on active duty and held the rank of LT from November 22, 2000, until he resigned his active duty commission on August 23, 2003. The JAG stated that under Article 1.H.2.d. of the Personnel Manual, the applicant's Reserve LT date of rank should have remained November 22, 2000. Article 1.H.2.d.1. states, "If [an] applicant is approved [for a Reserve Commission] with an appointment to the same grade, the date of rank shall remain the same if the applicant resigned their commission from active duty."

The JAG stated that the applicant only requested to have his date of rank corrected, but the Reserve Policy Manual provides for other relief when an officer is not considered by a selection board due to administrative error. The JAG stated Article 7.A.7.b. of the Reserve Policy Manual, reads in pertinent part:

A Reserve officer is not considered to have failed selection if the officer was not considered by a selection board due to administrative error.

(1) If the officer is selected by the next appropriate selection board after the error is discovered, and is promoted, then the date of rank and precedence on the IDPL shall be assigned that would have been assigned if the officer had been recommended for promotion by the selection board that originally would have considered the officer but for the error (14 U.S.C. 739(b)).

(2) However, such officer's *date of appointment, which is the effective date that pay and allowances in the higher grade begins, cannot be backdated.* The date of

appointment is that date the Secretary exercises promotion authority regardless of how much later that date maybe than the date of rank.

The JAG recommended that the applicant's record be corrected to show November 22, 2000, as his LT date of rank. Further the JAG recommended that the applicant's record be placed before the calendar year 2006 IDPL LCDR selection board, and if he is selected for promotion by that board, he be given the same date of rank that he would have had if he had been selected for promotion for LCDR by the calendar year 2005 selection board. The JAG also stated that although the Coast Guard could not back date the applicant's appointment to award back pay, the Board or the Secretary could provide the applicant with back pay if he is entitled to it, under 10 U.S.C. § 1552(c). This provision of the law authorizes the Secretary to pay a claim for loss of pay or allowances if it is found to be due the claimant as a result of correcting a military record. In addition, the JAG stated that under 14 U.S.C. § 736(c) the Secretary may adjust a date of appointment, which is the effective date of pay and allowances in the higher grade, as a matter of equity.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On April 11, 2006, the advisory opinion was sent to the applicant for a response. The BCMR did not receive a reply to the advisory opinion from the applicant.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's record and submissions, the Coast Guard's submission, and applicable law:

1. The BCMR has jurisdiction of the case pursuant to section 1552 of title 10, United States Code. The application was timely.

2. The Coast Guard admitted, and the Board finds, that it committed an error by assigning the applicant a November 22, 2002, LT date of rank in the Coast Guard Reserve. The applicant's Reserve LT date of rank should have been November 22, 2000, the same as his LT date of rank while in the regular Coast Guard. Since the applicant resigned his active duty commission and was approved for a Reserve appointment in the same grade held while on active duty, his LT date of rank should have remained November 22, 2000. See Article 1.H.2.d.1. of the Personnel Manual.

3. The Coast Guard also found, and the Board agrees, that the date of rank error was prejudicial to the applicant because it prevented the calendar year 2005 IDPL LCDR selection board from reviewing his record. Therefore, in accordance with Article 7.A.7.b.(1) of the Reserve Policy Manual, the JAG recommended not only that the applicant's date of rank be corrected, but that the applicant's record be placed before the

calendar year 2006 LCDR promotion board, and if selected for promotion by that board that the applicant's LCDR date of rank, once promoted, be adjusted to the date he would have received if he had been selected by the 2005 LCDR IDPL selection board. In the absence of an objection from the applicant, the Board agrees with this recommendation for relief, and as discussed below, further finds that the applicant is entitled to back pay and allowances, if he is selected by the calendar year 2006 IDPL LCDR board. The applicant did not object to this relief.

4. The Coast Guard stated that *it* could not award back pay and allowances because under Article 7.A.7.b.(2) of the Reserve Policy Manual, the applicant's LCDR appointment that would authorize pay in the higher grade, if he is selected by the 2006 IDPL LCDR selection board, could not be back dated. However, the Coast Guard conceded that 10 U.S.C. § 1552 empowers the Board or the Secretary to award back pay and allowances, if the applicant is entitled to it.¹ The Board finds that if selected by the calendar year 2006 IDPL LCDR selection board, the applicant is entitled to back pay, once he is promoted and his date of rank is adjusted retroactively. The failure to award back pay under the circumstance of this case would constitute an injustice that would shock our sense of justice.² In this regard, the Coast Guard's error has already delayed the applicant's consideration for promotion to LCDR by one year and the failure to award back pay, if the applicant is selected for and promoted to LCDR by the 2006 selection board, would result in the applicant losing significant pay over the course of his career through no fault of his own. The Board has a duty to award thorough and fitting relief,³ which includes granting back pay and allowances in this case.

5. By way of information, the relief being awarded in this case is that which the Board normally grants in these circumstances. The Board has directed back pay and allowances in similar cases, with the agreement of the Coast Guard. For instance in BCMR No. 2001-040, the applicant's record was not considered by the 1999 lieutenant selection board due to administrative error. He was selected the next year. The Coast Guard itself adjusted that applicant's date of rank retroactive to the date he would have had if he had been selected by the earlier board and directed the applicant to apply to the BCMR for back pay and allowances with a favorable recommendation for relief.

6. Accordingly, the applicant is entitled to relief directed below.

¹ See also 14 U.S.C. § 736 (empowering the Secretary of the Department to back date appointments).

² In Reale v. United States, 208 Ct. Cl. 1010, 1011 (1976), injustice is defined as treatment (or the lack thereof) by military authorities that shocks one's sense of justice.

³ In Yee v. United States, 512 F. 2d 1383, 1387, the Claims Court stated that military corrections boards "have an abiding moral sanction to determine . . . the true nature of an alleged injustice and to take steps to grant thorough and fitting relief." Citing Duhon v. United States, 471 F. 2d 1278, 1281, quoting Caddington v. United States, 178 F. Supp. 604, 607, (1959).

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

The application of LT XXXXXXXXXXXXXXXXXXXX, USCGR, for correction of his military record is granted, as follows:

(1) The Coast Guard shall correct the applicant's record (including the letter appointing him a LT in the Reserve, the IDPL Registry of Officers, and the Reserve LT Oath of Office) to show November 22, 2000, as his LT date of rank in the Coast Guard Reserve.

(2) The applicant's record shall be placed before the calendar year 2006 IDPL LCDR promotion board. If he is selected for promotion by that selection board, his LCDR date of rank, once promoted, shall be adjusted retroactively to the date he would have been assigned if he had been selected by the calendar year 2005 selection board, with back pay and allowances.

Stephen H. Barber

Dorothy J. Ulmer

Eric J. Young

